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Dear Mr Bradshaw

INDEPENDENT COMMISSION AGAINST CORRUPTION

The Law Society Northern Territory (Society) welcomes the opportunity to comment on the draft Independent Commission Against Corruption Bill (Bill).

Executive Summary

The Society strongly supports the establishment of the ICAC and applauds the work that has gone into balancing the rule of law against the objectives of an ICAC. The Society supports the Bill in general but a number of recommendations to deal with some specific concerns arising from the Bill.

Natural Justice and Procedural Fairness

The Society supports the application of the principles of natural justice and procedural fairness to the ICAC processes. These principles appear generally to be well applied with a number of specific sections providing for the ICAC to give notice and invite further submission from a person before adverse findings or an adverse report is made. The Society recommends that vigilance be applied to safeguard these rights should any amendments arise from the consultation process.

The Society is concerned however that there are areas of the Bill which could amount to the denial of natural justice and procedural fairness.

Legal Representation

The Society is concerned that the entitlement of a person to be legally represented is ultimately at the discretion of the ICAC. The right to a fair hearing is entrenched in Schedule One of the Bill. However, a lack of legal representation may put this process in jeopardy.

The Martin report recommended that s.127 of the Victorian IBAC be adopted. Section 127 of the Victorian IBAC Act provides that in certain circumstances the IBAC may

direct a witness not to seek legal advice or representation from a specified Australian legal practitioner if the IBAC considers, “on reasonable grounds”, that the examination would be “prejudiced” because the Australian legal practitioner is:

- (a) the witness in the examination or another examination; or
- (b) the representative of another witness in the examination or another examination; or
- (c) a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate; or
- (d) the representative of a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate.

The draft Bill appears to be an adapted version of these provisions. The intent of the Victorian provision is not to deny a person a right to legal representation, rather deny the right to a legal representative of their choice. In the Society’s view the Martin recommendation should be adopted and ss. 34 and 42 of the Bill be amended accordingly. Further, the Society fails to see how the provision of sound legal advice could prejudice an investigation, other than those mentioned above.

This provision should also be adapted to the use of an interpreter.

The Right to an Interpreter

The Society is concerned about the restriction on the use of interpreters in the Bill. Currently the Bill only provides for the use of an interpreter at an ‘examination’ and ‘public inquiry’ and not a general requirement across the functions of the ICAC.

Further, the use of an interpreter is entirely at the discretion of ICAC. The Explanatory Notes provide that ICAC may refuse a *particular interpreter* however; this position is not reflected in the Bill. As with the right to legal representation above, a person should be entitled to an alternative interpreter if the interpreter in question is the subject to similar criteria as set out in s.127 of the IBAC.

It is fundamental that a person must understand the proceedings before them.

Australian courts have long recognised that access to an interpreter is an essential factor in receiving a fair hearing for a person who is otherwise unable to participate fully in the proceedings. Although the ICAC is not a court it does have coercive powers and contain serious offence provisions¹.

The Northern Territory has led the way nationally highlighting the need for interpreters. The Northern Territory was the first jurisdiction to develop Indigenous Protocols for Lawyers², the Anunga Rules³ and holds the Language in the Law Conference, hosted by the Supreme Court, a specialised conference for interpreters who provide services to person in a Court setting where English is not their first language. Further the Northern Territory has a well utilised Aboriginal Interpreter Service, an Interpreting and Translating Service and DeafNT which are all able to assist.

¹ For example ss.143, 148

² Available at <http://www.lawsocietynt.asn.au/>

³ *R v Anunga* (1976) 11 ALR 412

Schedule One of the Bill provides that the ICAC must act with fairness. There is also the need to uphold the rule of law and to act with cultural sensitivity. However, Schedule One is not binding in that the ICAC can decide which provisions it takes into account. The Explanatory Notes provide an example where competing demands may make it difficult to use an interpreter and that an interpreter may be unavailable. The Explanatory Notes also provide that it is assumed that the ICAC will recognise the importance of using an interpreter and provide the subject of an investigation reasonable opportunity to obtain an interpreter. In our view the assumption is not enough to ensure that this right exists.

The Society recommends that an amendment be made to the Bill to provide that a person must be provided with an interpreter, for the duration of any ICAC operations, unless that person can understand and speak the English language sufficiently to make an adequate reply to questions. The Society also recommends the Bill enshrine that the ICAC bears the responsibility for providing an interpreter, not the witness. The International Covenant on Civil and Political Rights of 1966⁴ guarantees the right of a defendant to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Waiver of privilege including legal professional privilege and the privilege against self-incrimination

Ensuring a person has a meaningful right to avoid self-incrimination when they are subject to criminal proceedings is essential to avoid prejudice to the constitutionally protected right of an accused to a fair trial⁵. The waiver of privilege against self-incrimination appears to be balanced in the Bill, as any self-incriminating evidence given in the ICAC investigation can't be used in subsequent civil, criminal or disciplinary proceedings. However, the effective operation to preserve privilege for subsequent prosecutions is conditioned upon that the person having a legal representative and if necessary an interpreter, with them. Section 78 provides a good example of where legal representation (and if the person could not speak English sufficiently an interpreter) would be fundamental especially to understand the consequences of giving evidence in the circumstance that would see a person incriminate themselves in a criminal context.

With respect to the statutory waiving of privilege s. 77 of the Bill protects an individual's client legal privilege. The Explanatory Notes provide that under s. 76(1)(c) client legal privilege is removed for a public body only where that public body is the Territory and that legal advice of private entities is maintained. However, we are of the opinion that the current drafting of this section would result in private entities that are contracting parties with the Territory being caught and having their legal privilege waived. Those private corporations would fall within the definition of public bodies and as such privilege could be claimed for legal advice given to a director of a company but not to the company itself or its board of directors. Given the broad variety of public bodies caught by the ICAC the Society recommends that this section be amended to draw a distinction between different public bodies caught by the Bill and 'the Territory'.

⁴ Article 14(3)(f)

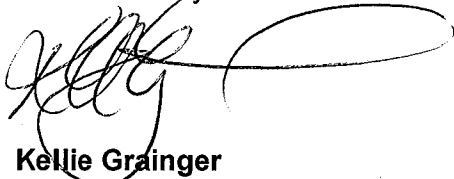
⁵ See *X7 v Australian Crime Commission* (2013) 248 CLR 92

Definition of Public Body

The Society considers clarification is required as to the source of funding for a body to be caught in the definition of 'public bodies'. Section 14 (1)(k)(i) provides a body, whether incorporated or not, supported directly or indirectly by government funds or other assistance is a public body. There is no definition of 'government funds' or 'other assistance' and the Society believes the Bill should be clarified to show whether this extends to the misuse of Commonwealth Government funding and resources or is restricted to Territory Government funding and resources.

We hope you find these recommendations of assistance.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Kellie Grainger', with a large, sweeping flourish extending to the right.

Kellie Grainger
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